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In the Supreme Court of the United States

OCTOBER TERM, 1976

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ELECTRO VECTOR, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	4
Reasons for granting the writ	8
Conclusion	18
Appendix A	1A
Appendix B	7A
Appendix C	8A
Appendix D	26A

CITATIONS

Cases:

American Fire Apparatus Co. v. *National Labor Relations Board*, 380 F. 2d 1005	14
Geauga Plastics Co. v. *National Labor Relations Board*, 404 2d 1382	14
K–D Manufacturing Co., 169 NLRB 57	17
Marshall Field & Co. v. *National Labor Relations Board*, 318 U.S. 253	9, 12, 14
National Labor Relations Board v. *Cast-a-Stone Products Co.*, 479 F. 2d 396	14
National Labor Relations Board v. *Cheney California Lumber Co.*, 327 U.S 385	8, 9, 10, 12
National Labor Relations Board v. *District 50, United Mine Workers*, 355 U.S. 453	9
National Labor Relations Board v. *Duncan Foundry and Machine Works, Inc.*, 435 F. 2d 612	17
National Labor Relations Board v. *Erie Resistor Corp.*, 373 U.S. 221	15

234-376—77——1

Cases—Continued

	Page
National Labor Relations Board v. *Frick Co.*, 397 F. 2d 956	17
National Labor Relations Board v. *Great Dane Trailers, Inc.*, 388 U.S. 26	6, 14
National Labor Relations Board v *International Union of Operating Engineers Local 66, A B & C*, 357 F. 2d 841	14
National Labor Relations Board v. *Maine Sugar Industries, Inc.*, 425 F. 2d 942	14
National Labor Relations Board v. *Midwestern Manufacturing Co.*, 388 F. 2d 251	14
National Labor Relations Board v. *Nello Pistoresi & Son, Inc.*, 500 F. 2d 399	8, 16
National Labor Relations Board v. *Ochoa Fertilizer Corp.*, 368 U.S. 318	8, 9, 10, 13
National Labor Relations Board v. *Seven-Up Bottling Co.*, 344 U.S. 344	9, 12
Nello Pistoresi & Son, Inc., 203 NLRB 905	16
Nix v. *National Labor Relations Board*, 418 F. 2d 1001	14
Puerto Rico Drydock & Marine Terminals, Inc. v. *National Labor Relations Board*, 284 F. 2d 212	14
Red Cross Drug Co. v. *National Labor Relations Board*, 419 F. 2d 1245	14
Sullivan Dry Dock & Repair Corp., 67 NLRB 627	17
Tex Tan Welhausen Co. v. *National Labor Relations Board*, 419 F. 2d 1265, remanded on other grounds, 397 U.S. 819	17
United States v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33	11

Statutes:

	Page
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):	
Section 7	2, 17
Section 8(a)(1)	2, 6, 16, 18
Section 8(a)(3)	2, 3, 6, 15, 17
Section 8(a)(5)	16
Section 10(e)	3, 9, 10, 11, 13, 14, 18

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v.
ELECTRO VECTOR, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 539 F. 2d 35. The decision and order of the National Labor Relations Board (App. C, *infra*) are reported at 220 NLRB 445.

JURISDICTION

The opinion of the court of appeals was entered on August 5, 1976, and the Board's timely petition for rehearing and suggestion for rehearing *en banc* (App. B, *infra*) was denied on January 17, 1977. On April 6,

1977, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including May 9, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in view of the employer's failure to raise the issue before the Board, Section 10(e) of the National Labor Relations Act foreclosed the court of appeals from considering whether a cash bonus for work previously performed, and paid by the employer to employees who were working on certain dates but withheld from employees who were striking on those dates, was a term or condition of employment within the meaning of Section 8(a)(3) of the Act.

2. Whether, if the court of appeals was not foreclosed, it erred in concluding that the bonus was not a term or condition of employment within the meaning of Section 8(a)(3) of the Act merely because it was discretionary in amount and of recent origin, and in failing to consider the Board's alternative finding that the employer's conduct also violated Section 8(a)(1) of the Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

> Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to

> engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * *.
>
> Section 8(a). It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.
>
> Section 10(e). The Board shall have power to petition any court of appeals of the United States * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order * * *. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent,

or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

STATEMENT

Respondent ("the Company") manufactures electronic products in its plant in California. It employs approximately 100 production and maintenance employees, who, for at least 8 years, have been represented for collective bargaining purposes by General Truck Drivers, Warehousemen & Helpers Union, Local 980, International Brotherhood of Teamsters ("the Union") (App. C, *infra,* 16A; Tr. 30.)[1] On May 2, 1974, during negotiations for a new contract, the Union, in support of its bargaining demands, called a strike which was still continuing at the time of the Board hearing in March 1975 (App. C, *infra,* 16A; Tr. 7, 11–12, 14–15). Initially, all of the unit employees participated in the strike, but approximately one-third returned to work two or three weeks after the strike started and more employees returned thereafter (App. C, *infra,* 17A; Tr. 20–21, 39–40).

The Company's fiscal year is October 1 through September 30. On November 27, 1974, the Company

[1] "Tr." references are to the stenographic transcript of the hearing before the Administrative Law Judge. "GCX" references are to the exhibits introduced at the hearing by the Board's General Counsel.

paid a bonus, in varying amounts, to 101 of its employees who had worked for some period during the Company's fiscal year and who also worked on both September 30 and November 27, 1974 (App. C, *infra,* 17A; Tr. 17, 23–24, 29, GCX 5).[2] A majority of the employees received less than $150 (the base figure) because of absences from the payroll during the fiscal year. Included in this group were employees who had abandoned the strike prior to September 30 and striker replacements (App. C, *infra,* 17A; Tr. 21, 24, 30–31, 34–35). A few employees, whose performance Vice-President-General Manager Del Valle considered exceptional, received more than $150 (App. C, *infra,* 17A–18A; Tr. 26–27, 29).

None of the approximately 33 employees who had worked for some period during the 1974 fiscal year but who were still striking on September 30 or November 27 was paid the bonus (App. C, *infra,* 9A, 17A; Tr. 7–8, 10–11, 18; GCX 3). Approximately nine employees who were working at the end of the fiscal year, September 30, but were not working on the day the bonus was actually paid, November 27, also did not receive the bonus (App. A, *infra,* 2A; Tr. 23).

[2] Year-end cash bonuses were instituted by the Company in 1973, in lieu of its former practice of distributing hams and turkeys (App. C, *infra,* 18A; Tr. 18, 29–30). The Company's reasons for instituting the bonus were to mitigate the economic "tough time" the employees were suffering in 1973 "due to the inflation," and "to motivate [the employees] to better attendance" (App. C, *infra,* 18A; Tr. 28–29, 36–37). The Company utilized the same eligibility requirement for payment of the 1974 bonus as it did for payment of the 1973 bonus (App. C, *infra,* 18A; Tr. 17, 23–24, 29–30).

234-376—77——2

After charges had been filed by the Union, and a hearing held, the Administrative Law Judge ruled that the Company had discriminated against striking employees in violation of Section 8(a)(3) and (1) of the Act by paying a year-end bonus, based on time previously worked, to nonstriking employees, strikers who had returned to work, and replacements for strikers, while denying the bonus to employees still on strike (App. C, *infra,* 18A–21A). The Company filed two general exceptions to the Judge's decision, broadly challenging the statement and conclusion of law that its exclusion of strikers from bonus distributions violated Section 8(a) (3) and (1) of the Act (App. D, *infra,* 26A–27A). The Company also filed a supporting brief, contending that it had not discriminated against strikers and that any denial of benefits was supported by substantial business justifications. The Company at no time contested that the bonuses were "a term or condition of employment."

The Board, applying the principles set forth in *National Labor Relations Board* v. *Great Dane Trailers, Inc.,* 388 U.S. 26, affirmed the decision of the Administrative Law Judge (App. C. *infra,* 8A–14A). The Board reasoned that, since "[d]epriving striking employees of the benefits which they have previously qualified for because they are on strike will have the natural tendency of coercing employees to give up the strike" (App. C, *infra,* 9A), *Great Dane* required the employer to come forward with a legitimate business

justification for disqualification of the strikers. The Board concluded that, while it is "legitimate to reduce the bonus by the length of any employee's absence, even if that absence is due to a strike,"[3] the Company "offers no justification, nor do we preceive any, for its requirement that the strikers be actually on duty on the two eligibility dates" (App. C, *infra,* 9A–10A). The Board ordered the Company, *inter alia,* to restore the strikers to eligibility for the 1974 bonus and to pay them their share "reduced *pro rata* for their absences from the job during the pertinent fiscal year whether because on strike or for any other reason" (App. C, *infra,* 10A–11A, 22A, 23A).

The court of appeals denied enforcement of the Board's order, finding it to be "not supported by substantial evidence" (App. A, *infra,* 1A). In the court's view, the Board's ultimate finding of discrimination implicitly rested on a threshold finding that the Company's "bonus practice involved a term or condition of employment" (App. A, *infra,* 3A). Although admitting that the parties had not raised the issue (App. A, *infra,* 3A), the court held that it was not bound to accept this finding unless it was "supported by substantial evidence in the record taken as a whole" (App. A, *infra,* 4A). Making its own independent examination of the record, the court concluded that the short history of the

[3] The Board noted (App. C, *infra,* 10A) that the Administrative Law Judge's proposed remedy, which it adopted, called for such a reduction.

bonus program, combined with its informal nature and the discretionary variance in the amounts of the individual bonuses, indicated that it "was a gift rather than a wage" and therefore not a "term or condition of employment" (App. A, *infra*, 4A–6A).[4]

The Board filed a petition for rehearing and suggestion for rehearing *en banc*, contending that the court's consideration of an issue not previously raised by the Company before the Board was contrary to Section 10(e) of the Act and this Court's decisions in *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U.S. 385, and *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318. The court denied the Board's petition for rehearing and rejected the suggestion for rehearing *en banc* (App. B, *infra*, 7A).[5]

REASONS FOR GRANTING THE WRIT

1. The decision of the court of appeals, overturning the Board's finding of an unfair labor practice on a ground not raised before the Board, is inconsistent

[4] The court applied the test enunciated in an earlier decision, *National Labor Relations Board* v. *Nello Pistoresi & Son, Inc.*, 500 F. 2d 399, 400 (C.A. 9), *i.e.*, "Bonuses * * * are considered wages if they are of such a fixed nature and have been paid over a sufficient length of time to have become a reasonable expectation of the employees and, therefore, a part of their anticipated remuneration" (App. A, *infra*, 4A).

[5] The court stated: "The full Court was advised of the Suggestion for Rehearing en banc. An active judge of the Court suggested that the opinion may be in conflict with Supreme Court cases cited by the Government, but later, after considering the reply to the Board's Petition, withdrew his objection" (App. B, *infra*, 7A).

with the plain language of Section 10(e) of the National Labor Relations Act and with numerous decisions of this Court. *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U.S. 385; *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318. See also *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253; *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344; *National Labor Relations Board* v. *District 50, United Mine Workers*, 355 U.S. 453. Proper interpretation of Section 10(e) is of great importance to the administration of the Act, since that Section enables the Board to act expeditiously on uncontested issues and give full and proper consideration to the issues that are in dispute.

Section 10(e) of the Act provides that in reviewing an order of the Board:

> No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

The purpose of this provision is to give the reviewing court the benefit of the Board's views on disputed questions of fact and law.

In *National Labor Relations Board* v. *Cheney California Lumber Co., supra*, this Court held that the court of appeals had improperly limited an order is-

sued by the Board in a litigated proceeding because no objection to the breadth of the order had been urged before the Board. The Court held that the duty of a court of appeals in such circumstances is "to render judgment on consent as to all issues that were contestable before the Board but were in fact not contested" (327 U.S. at 389). The Court then noted:

> Justification of such an order, which necessarily involves consideration of the facts which are the foundation of the order, is not open for review by a court if no prior objection has been urged before the case gets into court and there is a total want of extraordinary circumstances to excuse "the failure or neglect to urge such objection * * *" Congress desired that all controversies of fact, and the allowable inferences from the facts, be threshed out, certainly in the first instance, before the Board. * * * [*ibid.*]

This construction of Section 10(e) was reaffirmed in *National Labor Relations Board* v. *Ochoa Fertilizer Corp., supra.* Unlike *Cheney,* there was no formal proceeding at all before the Board in *Ochoa* but rather the order was entered pursuant to a settlement agreement. This Court disagreed with the court of appeals that it was nonetheless entitled to satisfy itself that there was record support for the Board's order, stating (368 U.S. at 323):

> We understand the opinion of the Court of Appeals to hold that the limitation of § 10(e) is inapplicable when the record contains no findings or facts supporting the order—that "affirmative reasons must appear to warrant broad injunctions." * * * The court reasoned that the limitation of § 10(e) was therefore no barrier to its *sua sponte* revision of the order and stated that "We do not think that consent makes the difference." * * * Contrary to the Court of Appeals, we think that consent makes a significant difference; it relieves the Board of the very necessity of making a supporting record. * * *

See also *United States* v. *L. A. Tucker Truck Lines, Inc.,* 344 U.S. 33, 37 ("Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice").

In the present case, the court of appeals disregarded Section 10(e), and thus exceeded its reviewing authority, by considering and deciding the question whether the bonus paid by the Company was a term or condition of employment. As the court acknowledged (App. A, *infra,* 3A): "No such finding was expressly made [by the Board] nor was this implicit finding discussed in the parties' briefs before this Court. Rather, the proceedings below focused on whether Electro's activities discouraged union membership and whether these activities had an anti-union

motive."[6] Moreover, the court suggested no extraordinary circumstances that would excuse the failure to present the issue to the Board.

The court of appeals apparently believed that it was required to satisfy itself that the Board's findings of fact were supported by substantial evidence on the record considered as a whole in order to insure that it was not entering a decree where "the Board has patently traveled outside the orbit of its authority." *Cheney, supra,* 327 U.S. at 388. However, while this

[6] Before the Board, the Company made the following exceptions (App. D, *infra*, 26A–27A).

"To the statement of the Administrative Law Judge that the Employer's exclusion of strikers from participation in the bonus distribution, because not on the active payroll at the prescribed times, violated Section 8(a) (3) and (1).

"To the Administrative Law Judge's conclusion of law that by disqualifying strikers from bonuses as found in this case, the Respondent ELECTRO VECTOR, INC., engaged in unfair labor practices within Section 8(a) (1) and (3) of the Act."

Contrary to the Company's contention (Reply to Pet. for Rehearing, p. 6), these general exceptions were not sufficient to place "the burden upon the Board to support its order as to questions of fact by substantial evidence on the record, which requires a showing that the employer has discriminated against employees with respect to a term or condition of employment." See *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 255 (objection that the Trial Examiner had erred "in making each and every recommendation" did not sufficiently apprise the Board that the employer intended to press the question whether unemployment compensation benefits should be deducted from backpay award); *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 350 (objection that the Examiner's "recommendations as to the remedy were contrary to, and unsupported by, the evidence and contrary to law" did not give adequate notice to the Board that the employer intended to contest the propriety of computing backpay on a quarterly basis for a seasonal business).

Court in *Cheney* did acknowledge that a court of appeals need not render a decree "if the Board has patently traveled outside the orbit of its authority so that there is, legally speaking, no order to enforce" (*ibid.*), that narrow exception to the policy of Section 10(e) applies only to an order that would be beyond the Board's power on any conceivable set of facts. Thus, the Court in *Ochoa* found that the standard of *Cheney* had been satisfied, despite the absence of any record, because "[t]he order here consented to would be within the Board's authority under appropriate circumstances." 368 U.S. at 322, n. 6. It is unquestionably within the Board's authority to find that a cash bonus is a term and condition of employment (see *infra,* pp. 14–18) and to prohibit discrimination in the award thereof.[7]

The requirements of Section 10(e) are of considerable importance to the Board. In the sensitive area of labor-management relations, it is plainly inappropriate to permit a party to leave important issues, whether factual or legal, unaddressed and unbriefed before the Board and then challenge their resolution before the reviewing court on the ground of an inadequate supporting record. Under such circumstances the Board is not only deprived of the opportunity to apply its own experienced judgment in the first instance—a judgment that well may assist the court of

[7] Indeed, the court below acknowledged that "If Electro had adopted a formal program of paying a cash bonus or had paid a bonus for a number of years, we might reach a different result" (App. A, *infra*, 5A).

234-376—77——3

appeals on review—but also of the opportunity to insist upon a fuller record appropriate for resolution of those issues. Such deprivation is directly contrary to "the salutary policy adopted by § 10(e) of affording the Board opportunity to consider on the merits questions to be urged upon review of its order" (*Marshall Field & Co.* v. *National Labor Relations Board, supra,* 318 U.S. at 256).[8]

2. The need for proper observance of Section 10(e) is emphasized by the decision in this case, which is not only inconsistent with the rationale of this Court's decision in *National Labor Relations Board* v. *Great Dane Trailers, Inc.,* 388 U.S. 26, but also violative of a fundamental purpose of the Act to safeguard em-

[8] Other courts of appeals have properly recognized the policy of Section 10(e). Thus, in *American Fire Apparatus Co.* v. *National Labor Relations Board*, 380 F. 2d 1005, 1006, the Eighth Circuit held that an employer was "precluded by Section 10(e) of the Act from obtaining judicial review" of his contention "that he did not commit an unfair labor practice by failing to pay the employees a Christmas bonus," when no exceptions on that issue were taken to the Trial Examiner's decision.

See also *National Labor Relations Board* v. *Maine Sugar Industries, Inc.*, 425 F. 2d 942, 944 (C.A. 1); *National Labor Relations Board* v. *International Union of Operating Engineers, Local 66, A, B & C*, 357 F. 2d 841 (C.A. 3); *National Labor Relations Board* v. *Cast-a-Stone Products Co.*, 479 F. 2d 396 (C.A. 4); *Nix* v. *National Labor Relations Board*, 418 F. 2d 1001, 1009 (C.A. 5); *Geauga Plastics Co.* v. *National Labor Relations Board*, 404 F. 2d 1382, 1383 (C.A. 6); *Red Cross Drug Co.* v. *National Labor Relations Board*, 419 F. 2d 1245, 1249 (C.A. 7); *National Labor Relations Board* v. *Midwestern Manufacturing Co.*, 388 F. 2d 251, 253 (C.A. 10); *Puerto Rico Drydock & Marine Terminals, Inc.* v. *National Labor Relations Board*, 284 F. 2d 212, 215–216 (C.A. D.C.).

ployees against discrimination for engaging in protected concerted activities.

While Section 8(a)(3), in relevant part, merely proscribes discrimination in regard to a "term or condition of employment," Congress entrusted the Board with the task of giving content to those terms in light of "the complexities of industrial life." *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 236. Thus, in *Great Dane Trailers, supra,* this Court accepted the conclusion of the Board and court of appeals (388 U.S. at 30) that a refusal to pay accrued vacation benefits to striking employees concerned "a term or condition of employment." Indeed, the Court recognized that the "result of the company's refusal to pay vacation benefits to strikers was discrimination in its simplest form" (*id.* at 32). The Court therefore struck down the denial of benefits to a group of employees identified "only by their participation in protected concerted activity" (*ibid.*).

The facts in this case present a very similar issue. The Company's bonus program, although only in its second year of operation, was tied to work performance. Employees earned less than the base amount if because of late hire or absenteeism they had missed work during the preceding year; superior work was compensated by bonuses larger than the base amount. The Board found that the bonus "was earned as a result of work attendance over the fiscal year" and that the striking employees had "previously qualified" for the bonus and would have received it had they not

been on strike (App. C, *infra*, 9A). In these circumstances, the Board could reasonably have concluded that the bonus accrued from the employment relation and thus was a "term or condition of employment."

The court of appeals did not disturb the Board's findings. Rather, relying on its decision in *National Labor Relations Board* v. *Nello Pistoresi & Son, Inc.*, 500 F. 2d 399, 401,* the court held that the discretionary amount of the bonus and the short duration of the program precluded characterization of the bonus as a term or condition of employment (App. A, *infra*, 5A–6A). However, while these factors may be relevant in determining whether a bonus withdrawn from all employees was a term or condition of employment (see n. 9, *supra*, and cases cited at App. A, *infra*, 3A–4A), they are immaterial where the employer has decided to pay a bonus. In those circumstances, an employer is not free to pay the bonus to some employees, and withhold it from others who are engaged in a strike or other

* In *Nello Pistoresi*, the court reversed the Board's conclusion that the company had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by terminating, in 1971, a bonus program that had been in effect for only two years. However, in *Pistoresi*, the Administrative Law Judge, whose findings were adopted by the court, had noted that, since the size of the bonus had been within the company's discretion and since the work force did not remain constant each year, there was no way to know whether or to what extent the failure to pay a bonus in 1971 was a substantial departure from past practice. See *Nello Pistoresi & Son, Inc.*, 203 NLRB 905, 910. Since a bonus was paid here on the same basis as it was paid in 1973, there is no doubt that it accorded with past practice.

activity protected by Section 7, without being subject to the ban on discrimination imposed by Section 8(a)(3). See *National Labor Relations Board* v. *Duncan Foundry and Machine Works, Inc.*, 435 F. 2d 612, 617, n. 8 (C.A. 7) ("Certainly, the Company was under no duty to apply the terms of the expired contract, but * * * if the terms were applied, they could not be applied discriminatorily"). See also *Tex Tan Welhausen Co.* v. *National Labor Relations Board*, 419 F. 2d 1265, 1271 (C.A. 5), remanded on other grounds, 397 U.S. 819; *National Labor Relations Board* v. *Frick Co.*, 397 F. 2d 956, 961–962 (C.A. 3); *Sullivan Dry Dock & Repair Corp.*, 67 NLRB 627, 634; *K–D Manufacturing Co.*, 169 NLRB 57, 60, 64.

The contrary view of the court below that a bonus is removed from the ambit of Section 8(a)(3) where it is discretionary in nature and of recent origin opens up a wide gap in the protection against discrimination afforded by that Section. Many employment benefits—*e.g.*, promotions, overtime work, favorable work shifts—are within the employer's discretion, at least absent their coverage in a collective bargaining agreement. Under the reasoning of the court below, the employer would be free to withhold such discretionary benefits from employees engaged in Section 7 activity without violating Section 8(a)(3). It is hardly likely that Congress would have intended to permit such a ready means of eluding the reach of the latter Sec-

tion's basic guarantee against discrimination for engaging in protected activity.[10]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.[11]

Respectfully submitted.

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MAY 1977.

[10] Apart from its unduly restrictive interpretation of "term or condition of employment" as used in Section 8(a)(3), the court below also failed to consider the Board's alternative finding that the Company's withholding of the bonus from employees who were striking on the specified dates also violated Section 8(a)(1) of the Act. Section 8(a)(1) proscribes any employer action which would "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7," without regard to whether a "term or condition of employment" is affected. To withhold from strikers a bonus which they had earned for work previously performed only because they were absent on specified dates due to the strike, would necessarily tend to deter the right to strike protected by Section 7.

[11] In light of the unequivocal language of Section 10(e) and its prior decisions under that Section, the Court may consider summary reversal to be appropriate in this case.

APPENDIX A

No. 75-3638

United States Court of Appeals, Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ELECTRO VECTOR, INC., RESPONDENT

Aug. 5, 1976

Opinion

Before BARNES, *Senior Circuit Judge,* and WRIGHT, and KILKENNY, *Circuit Judges*

BARNES, *Senior Circuit Judge:*

The National Labor Relations Board seeks enforcement of its order against Electro Vector, Inc. Affirming the administrative law judge, the Board held that the Company violated 29 U.S.C. § 158(a) (3) and (1) by granting a bonus for work previously performed, to employees who were actually working on September 30, and November 27, 1974, while denying such bonus for work previously performed to other employees who were striking on either of those two dates. We hold that because the Board's finding that the bonuses were wages, hours, or other term[s] or condition[s] of employment is not supported by substantial evidence, enforcement of its order is denied.

The relevant facts follow. Electro manufactures electronic equipment in a plant located near Santa

Rosa, California. The Company's production and maintenance employees have been represented for collective bargaining purposes by the Union for a number of years. On May 2, 1974, after the expiration of the prior contract and the breakdown of negotiations, the Union struck Electro over economic issues.

Electro followed a discretionary policy of paying "year-end" bonuses based on a fiscal year ending September 30, 1974. The previous 1972–73 fiscal year was the first year for paying cash bonuses. In prior years, turkeys and hams were distributed. Attendance and exceptional merit determined the amount paid above and below the base figure of $150.00. Eligibility for the bonus depended upon an employee maintaining "active payroll status" on two crucial dates—the final day of the fiscal year and the actual date of bonus payment, here, November 27, 1974.

The group which received the bonus included non-striking workers, strikers who had returned to work, and replacements for strikers. All of these employees had active payroll status on the two relevant dates—September 30 and November 27. Excluded were thirty-three strikers who had not worked either date and nine employees who had worked only one of those dates.

Subsequently, the Union filed charges against Electro alleging discrimination against the striking employees through the Company's refusal to pay them bonuses. The N.L.R.B. issued a complaint based on the charges and ordered a hearing. After such a hearing was conducted, the administrative law judge concluded that "[b]y disqualifying strikers from bonuses * * * [Electro] engaged in unfair labor practices within Section 8(a) (1) and (3) of the[National Labor Relations] Act." The judge recommended the

issuance of a cease and desist order and the payment of 1974 bonuses to the striking employees. Electro excepted. The Board, however, adopted the administrative law judge's recommendations and issued an order requiring bonus payments to the employees. Electro appeals from this order.

Implicit in the administrative proceedings below is a finding that Electro's bonus practice involved a term or condition of employment. No such finding was expressly made nor was this implicit finding discussed in the parties' briefs before this Court. Rather, the proceedings below focused on whether Electro's activities discouraged union membership and whether these activities had an anti-union motive. *See National Labor Relations Board* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 32–34, 87 S. Ct. 1792, 18 L. Ed. 2d 1027 (1967); *Portland Willamette Company* v. *National Labor Relations Board*, 534 F. 2d 1331, 1332 (9th Cir. 1976). But in order to determine whether Electro's activities violated the Act here, a preliminary requirement must be satisfied. It must be shown that there had been employer discrimination with respect to "[any] term or condition of employment." *See N.L.R.B.* v. *Great Dane Trailers, supra*, 388 U.S. at 30, 87 S. Ct. at 1976; *E. I. Du Pont de Nemours and Company* v. *N.L.R.B.*, 480 F. 2d 1245, 1248 (5th Cir. 1973).

The importance of this finding is that a bonus which is considered a "gift" can be withheld by the employer at will, but a bonus which is in reality a "wage" becomes a term or condition of employment. *See Century Electric Motor Company* v. *N.L.R.B.*, 447 F. 2d 10, 14 (8th Cir. 1971); *N.L.R.B.* v. *Harrah's Club*, 403 F. 2d 865, 874 (9th Cir. 1968); *N.L.R.B.* v. *Electric Steam Radiator Corporation*, 321 F. 2d 733,

234-376—77——4

736–37 (6th Cir. 1963). In elaborating upon this concept in *N.L.R.B.* v. *Nello Pistoresi & Son, Inc,* 500 F. 2d. 399 (9th Cir. 1974), this Court observed: "Bonuses * * * are considered wages if they are of such a fixed nature and have been paid over a sufficient length of time to have become a reasonable expectation of the employees and, therefore, part of their anticipated remuneration." *Id.* at 400.[1]

Applying these principles to the case before us, the Board was required to find that Electro's bonus policy involved a term or condition of employment. This Court is bound to accept this finding unless it is not supported by substantial evidence in the record taken as a whole. *Universal Camera Corp.* v. *N.L.R.B.,* 340 U.S. 474, 477–91, 71 S. Ct. 456, 95 L.Ed. 456 (1951). Upon examining the record, we find no such finding or any discussion thereof. Hence, we must conclude that the Board's finding is not supported by substantial evidence.

Our conclusion is based on the following evidence which appears in the record. Ms. Ann L. Waterman, an accountant for Electro, testified that prior to 1973, the company did not have a bonus program. In 1973, the company determined that it was financially able to pay a bonus. Even then, however, there was no official program established. Ms. Waterman further testified that even after the company began giving cash bonus to its employees, this bonus was not automatically given. Mr. Philip B. Del Valle, the vice president and general manager of Electro, testified that the giving of a bonus was not mandatory but was rather at the discretion of Electro's owner. He further testified that the bonus issue was not part of the Union contract that was in existence at the time of the controversy. Additionally, Mr. Del Valle stated:

> "[P]rior to 1973 there wasn't any bonuses. We gave turkeys or hams, but the inflation got so bad we realized the predicament of many of the people, and so I went to the owner. I don't have the authority to disburse profits. I went to the owner and I got him to agree to a certain sum of money and this was given, in essence in lieu of a turkey or in lieu of a ham, as being a little bit more substantial; but it wasn't a formal profit-sharing plan in any way. It was totally informal * * *."

R.T. at 29–30. None of the above testimony has been refuted by any other witness.

We thus must determine whether the payment of a cash bonus by Electro was of a fixed nature and had been paid over a sufficient period of time to have become a part of the employees' anticipated remuneration. From the above evidence, we conclude that the 1973–74 fiscal year was only the second year in which such a cash bonus was given. The amounts of these bonuses were determined primarily by Mr. Del Valle and ranged greatly from a base of $150.00. In *N.L.R.B.* v. *Nello Pistoresi & Son, Inc., supra,* we held that because of the short two-year history of the company giving cash bonuses to its employees and the indefinite nature of the bonuses, the bonuses did not constitute wages but were rather gifts. 500 F. 2d at 400–01. We find the case at bar indistinguishable. If Electro had adopted a formal program of paying a cash bonus or had paid a bonus for a number of years, we might reach a different result. But here, the cash bonus had only been given for two years, and was agreed upon by the owner only informally. We

[1] Neither petitioner nor respondent has seen fit to mention this two-year-old case in their briefs.

therefore conclude that the bonus given by Electro was a gift rather than a wage. Hence, the Union has failed to prove that there has been employer discrimination with respect to any term or condition of employment.

Accordingly, enforcement of the Board's order is denied. Respondent's counsel to prepare order.

APPENDIX B

In the United States Court of Appeals for the Ninth Circuit

No. 75–3638

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ELECTRO VECTOR, INC., RESPONDENT

[Filed January 17, 1977]

ORDER

Before: BARNES, WRIGHT, and KILKENNY, *Circuit Judges.*

After considering Petitioner's Petition for Rehearing with Suggestion for Rehearing en banc (filed September 9, 1976), and Respondent's reply to said Petition filed October 14, 1976, Judge Wright voted to deny the Petition for Rehearing and to reject the Suggestion for Rehearing en banc. Judges Barnes and Kilkenny voted to deny the Petition for Rehearing and recommended the denial of the Suggestion for Rehearing en banc.

The full Court was advised of the Suggestion for Rehearing en banc. An active judge of the Court suggested that the opinion may be in conflict with Supreme Court cases cited by the Government, but later, after considering the reply to the Board's Petition, withdrew his objection.

The Petition for Rehearing is denied, and the Suggestion for an en banc Rehearing is rejected.

APPENDIX C

United States of America Before the National Labor Relations Board

Case 20–CA–9771

ELECTRO VECTOR, INC. AND GENERAL TRUCK DRIVERS, WAREHOUSEMEN & HELPERS UNION, LOCAL 980, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Decision and Order

On April 8, 1975, Administrative Law Judge Richard J. Boyce issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.[1]

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[1] In the absence of exceptions, we adopt *pro forma* the Administrative Law Judge's conclusion that the strike was not converted into an unfair labor practice strike.

In support of our finding of a violation, we also rely on *N.L.R.B.* v. *Great Dane Trailers, Inc.* 388 U.S. 26 (1967).

The Administrative Law Judge finds that Respondent unlawfully denied bonus payments to striking employees. We agree.

The facts here are not in controversy. Respondent in 1974 had in effect a bonus program. Under the program such employees received a basic amount of $150, less diminutions due to absences or due to not being on the payroll for the entire fiscal year. The diminutions were based on a formula uniformally applied. However, no bonus was paid to any employee who was not on the active payroll, i.e., actually working, both on the last day of the fiscal year, September 30, and the date the bonus was paid, November 27, 1974. On May 2, 1974, the employees had gone on strike. The strike was continuing as of November 27, 1974. As a result of their participation in the strike, a number of employees were not on the payroll on the two qualifying dates and were, therefore, denied any bonus.

The benefit here was earned as a result of work attendance over the fiscal year. As of the May 2, 1974, strike date the employees had, under Respondent's formula, earned a part of the benefit subject only to their being on the active payroll on the two qualifying dates. Depriving striking employees of the benefits which they have previously qualified for because they are on strike will have the natural tendency of coercing employees to give up the strike.

Nevertheless, disqualification of the strikers is not unlawful if it serves Respondent's legitimate business interests in some significant fashion. *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26. It is, of course, legitimate to reduce the bonus by the length of any employee's absence, even if that absence is due to a

strike.[2] The Administrative Law Judge's proposed remedy, correctly, calls for such a reduction. However, Respondent offers no justification, nor do we perceive any, for its requirement that the strikers be actually on duty on the two eligibility dates. Thus, Respondent does not contend that the failure of employees to work on those dates, as opposed to any other dates of the year, has any significant impact on its business. Nor does it contend there is anything else special about those particular dates.

Depriving employees of any entitlement to the bonus which they had otherwise qualified for because they are on strike on two dates without special business significance is inherently destructive of the employees' right to strike.[3] Therefore, we adopt the Administrative Law Judge's finding that Respondent violated Section 8(a) (3) and (1) by depriving strikers of bonus payments.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Or-

[2] Cf. *Tex-Tan Welhausen Company and Tex-Tan Western Leather Company, Division of Tandy Corporation*, 172 NLRB 851, 889–890 (1968), enfd. 419 F. 2d 1265 (C.A. 5, 1969), rehearing denied and rehearing denied *en banc* Jan. 12, 1970.

[3] *Quality Castings Company*, 139 NLRB 928 (1962). The instant case is factually much stronger for the result reached than *Quality Castings*. In that case the employer sought to apply a 50-percent attendance requirement for eligibility to participate in a profit-sharing plan. Such a requirement bears at least some relationship to productivity. Whether there is a sufficient relationship to productivity to warrant denial of benefits to strikers must be determined on the facts of each case. We perceive no business justification herein which would even arguably warrant denial of benefits to strikers for failure to work on the two eligibility dates.

der of the Administrative Law Judge and hereby orders that Respondent, Electro Vector, Inc., Forestville, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C., September 18, 1975.

NATIONAL LABOR RELATIONS BOARD
BETTY SOUTHARD MURPHY,
Chairman.
HOWARD JENKINS, JR.,
Member.

Member FANNING, concurring

I concur in my colleagues' adoption of the Administrative Law Judge's Decision.

Pursuant to a practice instituted in 1973, Respondent paid a bonus to employees who worked for it during fiscal year 1974. Respondent's fiscal year runs from October 1 to September 30 of the following calendar year. The bonus was computed on a base of $150 for a full year's work, which amount was diminished according to a set formula for absences during the fiscal year. According to Respondent's officials, the reason for instituting the practice of paying a bonus was "a humanistic one due to the economic hardships which the employees were suffering * * * in addition to the company's desire to keep attendance at an optimum." Under Respondent's practice, the bonus earned by an employee during the fiscal year was paid to him only if he was on the "active payroll," i.e., actually working on September 30, the last day of the fiscal year, and on the date the Respondent chose to pay the bonus, which in 1974 was November 27.

A strike commenced on May 2, 1974, and was still in progress on November 27. Some strikers had returned to work prior to September 30, and those who

did and were not absent from work for other reasons on that date or on November 27 were paid their earned bonus computed on the basis of the amount of time actually worked during the fiscal year. The bonus was of course less than the $150 paid to employees who did not strike and worked the full fiscal year. Employees who remained on strike through November 27 and thus were not working on the two dates in question were not paid any bonus. Certain other employees who were absent for other reasons on September 30 or November 27 also did not receive a bonus.

The issue in this case is whether Respondent's treatment of the strikers' absence on September 30 and November 27 as absence from the "active payroll" constituted discrimination against the strikers because of their participation in protected concerted activities likely to discourage such participation. I think there is little doubt that that is the case, for quite clearly employees who did not go on strike, those who quit the strike prior to September 30, and those who were hired as replacements for strikers were paid the bonus, but the strikers were not. The sole reason the latter were not paid the bonus was that they chose to remain on strike rather than come to work on September 30 and remain at work until the Respondent chose a date (at his discretion to make the bonus payment. This different treatment of two groups of employees—one working, one on strike—each of which had earned a bonus, constituted "discrimination in its simplest form." *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 32. By the same token, the payment of the earned portion of the bonus to one group of employees but not to another "who are distinguishable only by their participation

in protected activities surely may have a discouraging effect on either present or future concerted activity." *Ibid.* There seems to me no reasonable doubt that the determination between the two groups was "so 'inherently destructive of employee interests' that it may be deemed proscribed without the need of proof of an underlying improper motive." *Id.* at 33. I can perceive no business justification that would excuse this discriminatory conduct.

Nor has Respondent come forward with a justification for discriminating between those employees who received the earned portion of their bonus and the strikers who did not. At most, Respondent argues that it did not have a discriminatory motive because it treated strikers the same way it treated other employees who were absent from work on September 30 or November 27. But the argument at once proves too little and too much. It proves too little because it does not address itself to the question of whether there was discrimination between those who received the bonus and the strikers who did not, but rather to the question whether there was discrimination between two groups of employees who did not receive the bonus. It proves too much in that with respect to those employees who did not receive the bonus the apparent reason for requiring their presence on the "active payroll" on September 30 and on some undisclosed date in the future when the payment was to be made was to discourage all absences from work.[4]

---

[4] The testimony of Respondent's accountant is inconsistent with the assertion that Respondent's policy requires presence at work on the two critical dates in all instances. As noted in Respondent's brief, she testified "that a person on lay-off for maternity leave might receive the bonus even though she was not actively working on the date of payment, if she had in fact been working at the close of the fiscal year."

Thus, Respondent's apparent justification for not paying the earned portion of their bonus to employees on strike on those dates was a desire to discourage their absence, which is to say it intended to discourage them from striking. The fact that it was not contrary to the Act for Respondent to use the payment—or nonpayment—of the bonus to discourage employees from absenting themselves from work for reasons not connected with the exercise of Section 7 rights cannot be a justification for discouraging employees from engaging in those protected activities. Respondent's equation of absence from work by reason of strike activity with other absences and its consequent discrimination between strikers and employees who had not struck or had ended their strike subverts the protection afforded employees' lawful strike activity. *Quality Casting Company,* 139 N.L.R.B. 928, 931.

I would therefore find that Respondent's denial of a bonus to strikers because they were not at work on September 30 and November 27 violated Section 8(a) (3) and (1) of the Act.

Dated, Washington, D.C., September 18, 1975.

NATIONAL LABOR RELATIONS BOARD,
JOHN H. FANNING,
Member.

JD-(SF)-68-75, Forestville, CA

United States of America before the National Labor Relations Board, Division of Judges, Branch Office, San Francisco, California

Case No. 20-CA-9771

ELECTRO VECTOR, INC. AND GENERAL TRUCK DRIVERS, WAREHOUSEMEN & HELPERS UNION, LOCAL 980, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Lucile L. Rosen, Atty., of San Francisco, Calif., for the General Counsel.

Michael P. Merrill, Esq., of Santa Rosa, Calif., for the Respondent.

Decision

I. STATEMENT OF THE CASE

RICHARD J. BOYCE, *Administrative Law Judge:* This case was tried before me in San Francisco, California, on March 4, 1975. The charge was filed December 3, 1974, and amended January 29, 1975, by General Truck Drivers, Warehousemen & Helpers Union, Local 980 (herein called the Union). The complaint issued January 29, 1975, was amended February 6, and alleges that Electro Vector, Inc. (herein called Respondent) violated Section 8(a) (1) and (3) of the National Labor Relations Act.

The parties were permitted at the trial to introduce relevant evidence, examine and cross-examine witnesses, and argue orally. Briefs were filed for the General Counsel and Respondent.

II. ISSUES

The issues are whether Respondent, by not paying year-end bonuses to economic strikers in the circumstances detailed below, violated Section 8(a) (1) and (3) of the Act; and, if so, whether the strike thereby was converted into an unfair labor practice strike.

III. JURISDICTION

Respondent is a California corporation engaged in Forestville, California, in the manufacture of electronic products. It annually sells and causes to be delivered to customers outside California products of a value exceeding $50,000.

Respondent is an employer engaged in and affecting commerce within Section 2 (2), (6) and (7) of the Act.

IV. LABOR ORGANIZATION

The Union is a labor organization within Section 2(5) of the Act.

V. THE ALLEGED UNFAIR LABOR PRACTICE

A. Facts

Respondent's production and maintenance employees are represented in collective bargaining by the Union. On May 2, 1974, during contract negotiations with Respondent, the Union called a strike in support of its demands. The strike is still on.

Respondent's fiscal year is October 1 through September 30. On November 27, 1974, it paid end-of-fiscal-year bonuses to those of its employees who were on the "active" payroll—i.e. actually working—on both that date and on the final day of the fiscal year, September 30. There were about 100 recipients, among them strikers who had quit the strike in time to meet September 30/November 27 qualifying standard, as well as striker replacements meeting that test. Respondent' general manager, Philip Del Valle, testified credibly and without refutation that the qualifying test was not compromised for anyone. Strikers and anyone else not satisfying it were ineligible. There were about 33 strikers in this category.

Among those qualifying, the bonus amounts varied. The basic amount was $150, but the great majority got less because of absenteeism or absence from the active payroll during the fiscal year.[1] A formula was uniformly applied in diminution of the basic $150 to allow for these factors, an exception being that absences sometimes were overlooked, as in the case of serious illness or maternity leave, if Del Valle felt the specific circumstances so warranted. The record does not set forth the particulars of the formula, and is devoid of citation to any given situation in which special dispensation was granted. Those who quit the strike and striker replacements received the same partial-year treatment as others who worked like periods of time. A select few, who in Del Valle's judgment had made exceptional contributions during the year, received above the basic $150. Four thus re-

[1] For example, Floyd Maes, hired September 26, 1974, received only $10.

ceived $225 in 1974. The record does not reveal the nature of their contributions.

Year-end bonuses were instituted by Respondent in 1973, in lieu of hams and turkeys. Although not a product of collective bargaining, they apparently had the Union's blessing. They were administered in exactly the same way in 1974 as 1973. To quote Del Valle: "[W]e took great pains to follow the exact formula so there would be no question of an unfair labor practice." A prime purpose of the bonuses is to stimulate better attendance, other purposes being to give the employees a stake in the success of the business after the fashion of profit-sharing plans and to ease the economic impact on employees of inflation and Christmastime.

No evidence was proffered that the denial of bonuses to strikers prolonged the strike. Two strikers testified of learning, at about the time the bonuses were granted, that they had been excluded from participation.

B. Discussion

It is concluded, in agreement with the General Counsel, that Respondent's exclusion of strikers from participation in the bonus distribution, because not on the active payroll at the prescribed times, violated Section 8(a) (3) and (1). This conclusion is grounded on *Quality Castings Company*, 139 NLRB 928—a case similar to the present.

Quality Castings involved distributions under a profit-sharing plan. Each employee, to qualify, had to have worked 50 percent of the time between January and September preceding distribution. As in the present case, the amounts paid to those qualifying were a function of absenteeism, exceptions being

allowed for excused absences. Some 64 employees, who had struck in April and May of that year and were not thereafter recalled for valid economic reasons, were deemed not to have satisfied the qualifying criterion.

The Board held that the disqualified strikers had been discriminated against in violation of Section 8(a) (3) and (1), determining that the respondent's interpretation of the qualifying criterion rested * * *

> * * * on the faulty premise that time on strike may lawfully be considered the equivalent of normal absence for purposes of determining profit-share forfeiture. [139 NLRB at 930]

The Board continued (139 NLRB 930–31):

> [T]he Respondent cannot be required to make distributions to individuals for the period they were absent on strike. Neither, however, can the Respondent state that strike time is merely another form of absence, equating it to other forms of absence discouraged by it, and then proceed to impose a total and non-proportionate forfeiture on employees because they engaged in such absences—in effect because they engaged in Section 7 activities.
>
> [N]otwithstanding the obvious fact that strike absences intensify an employer's production problems, strikers *are* given protection under the Act not available to workers whose absences are caused by other reasons. While the Act gives no protection to workers who are absent because of illness, athletic events, or family celebrations, it does protect employees who are absent because of a strike, and "excuse" such absences, in the sense contemplated by Respondent. Respondent's contrary treatment subverts the protection afforded by the statute, and its total denial of all profit-sharing benefits to the strikers because of their "absence" discrimi-

> nates against them as directly as if they were discharged for such activities. Surely the Respondent could not lawfully enforce a general discharge rule for absenteeism against the 64 strikers, merely because their participation in the strike for its duration constituted "excessive absenteeism" under the Respondent's formula. We therefore find that the 100-percent profit-sharing forfeiture * * * imposed by Respondent on the 64 strikers * * * was violative of Section 8(a) (3) and (1), regardless of Respondent's motivation in imposing such a penalty.[2]

This reasoning, which the Board has never disavowed, is equally opposite to the present situation.[3]

In addition to urging the illegality of Respondent's denial of bonuses to strikers, the General Counsel contends that the denials converted the strike into an

[2] *Citing Erie Resistor Corp.*, 132 NLRB 621, later to be affirmed by the Supreme Court at 373 U.S. 221 (1963).

[3] This reasoning, however, has experienced some difficulty at judicial levels. *Quality Castings Corpany* was reversed at 325 F. 2d 36 (Sixth Cir. 1963). Similarly, *Pittsburgh-Des Moines Steel Co.*, 124 NLRB 855, and *National Seal*, 141 NLRB 661, in which the Board used kindred reasoning to support violations, were reversed, respectively, at 284 F. 2d 74, (Ninth Cir. 1960) and 336 F. 2d. 781 (Ninth Cir. 1964). Board law, not that of the circuits, is controlling, however, at this juncture of this proceeding. E.g., *Bricklayers Local No. 1*, 209 NLRB No. 123, fn. 1. Academic criticism of the Board's *Quality Castings* reasoning appears in Getman, *Section 8(a)(3) of the NLRB and the Effort to Insulate Free Employee Choice*, 32 U. of Chi. L. Rev. 735, 741–42 (1965), wherein it is observed among other things:

> Where the employer applies uniform criteria which predate the particular situation, it makes sense to grant him considerable leeway * * *, [T]he fact that the employer applies these standards in situations which do not involve union activity indicates that there is a legitimate business interest involved.

unfair labor practice strike, entitling any strikers not theretofore permanently replaced to unqualified reinstatement upon their application. This contention is rejected. There is no evidence that the bonus misconduct influenced any striker to prolong the strike, and it is not manifest from the facts that the misconduct would have had that effect. The strike was called in aid of the Union's overall position in contract negotiations and already had been underway some 7 months. It cannot be assumed that the larger strike strategy was affected by the bonus matter. See *Romo Paper Products Co.*, 208 NLRB No. 96; *Anchor Rome Mills*, 86 NLRB 1120, 1122.[4]

VI. CONCLUSIONS OF LAW

1. By disqualifying strikers from bonuses as found herein, Respondent engaged in unfair labor practices within Section 8(a) (1) and (3) of the Act.

2. These unfair labor practices affect commerce within Section 2 (6) and (7) of the Act.

3. Respondent's misconduct, as found herein, did not convert the economic strike that began May 2, 1974, into an unfair labor practice strike.

VII. THE REMEDY

It is recommended that Respondent be ordered to cease and desist from the unfair labor practices found.

[4] The General Counsel's argument to the contrary cites *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963). As I read that decision, however, the Supreme Court did not address itself to the issue of the strike's status. Beyond that, a reading of the underlying NLRE decision—*Erie Resistor Corp.*, 132 NLRB 621—reveals that in that case, unlike the present, the striking employees expressly voted to continue the strike in protest of the company's unlawful conduct.

Affirmatively, it is recommended that Respondent be ordered to cure its unlawful discrimination by restoring to eligibility for the 1974 bonuses those disqualified because of strike-related absence, and by calculating their bonus shares in such a way that they do not suffer a disproportionate reduction because of their strike activities. Their shares may, however, be reduced *pro rata* for their absences from the job during the pertinent fiscal year whether because on strike or for any other reason. *Quality Castings Company, supra,* at page 932. Interest at the rate of six percent per annum from November 27, 1974, shall be included in the shares.

Those entitled to relief include:[5]

J. E. Anderson	M. Gramlich
J. L. Aviles	D. G. Herrington
S. A. Aviles	S. F. Hester
R. L. Beck	I. J. Jorgensen
A. Bribiescas	D. Karson
D. Burris	B. L. Kelly
S. E. Butters	S. L. Palmer
P. V. Cox	J. L. Say
D. G. Cresta	V. M. Signett
M. Cribbins	A. E. Skinner
S. L. Davis	E. Stockman
E. B. Edwards	J. B. Tryon
J. Frost	B. S. Vierra
H. P. Galusha	B. A. Wesley
P. A. Garrison	L. K. Whitley
G. A. Gibson	F. G. Wilson
R. N. Graham	

[5] And such others as are determined, in the compliance phase of this proceeding, to be entitled. *F.C.F. Papers, Inc.*, 211 NLRB No. 67, slip op. 7; *Boilermakers Local No. 101*, 206 NLRB No. 5, slip. op. 2, fn. 3.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[6]

Order

Respondent, Electro Vector, Inc., its officers, agents, successors, and assigns, shall:

I. Cease and desist from discouraging membership in General Truck Drivers, Warehousemen & Helpers Union, Local 980, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by discriminatorily denying a bonus distribution to employees because of their participation in a strike.

II. Take the following affirmative action:

A. Make whole the employees referred to in the Remedy section of this Decision, in the manner set forth in that section, for the losses suffered by reason of Respondent's discrimination against them.

B. Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary for determination of the amount of payment due under this Order.

C. Post at its place of business in Forestville, California, copies of the attached notice marked "Ap-

[6] All outstanding motions inconsistent with this recommended Order hereby are denied. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

pendix."' Copies of said notice, on forms provided by the Regional Director of Region 20, after being signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken to ensure that said notices are not altered, defaced, or covered by other material

D. Notify the Regional Director of Region 20, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated: April 8, 1975.

RICHARD J. BOYCE,
Administrative Law Judge.

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board—an Agency of the United States Government

The trial held in San Francisco, California, on March 4, 1975, in which we participated and had a chance to give evidence, resulted in a decision that we had committed certain unfair labor practices in violation of Section 8(a)(1) and (3) of the National

[1] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Labor Relations Act, as amended, and this notice is posted pursuant to that Decision.

Section 7 of the National Labor Relations Act, as amended, gives all employees the following rights:

To organize themselves

To form, join, or support unions

To bargain as a group through a representative they choose

To act together for collective bargaining or other mutual aid or protection

To refrain from any or all such activities.

In recognition of these rights, we hereby notify our employees that:

WE WILL NOT discourage membership in General Truck Drivers, Warehousemen & Helpers Union, Local 980, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by discriminatorily denying a bonus distribution to employees because of their participation in a strike.

WE WILL make whole the approximately 33 striking employees for losses suffered by reason of their being discriminatorily excluded from the November 1974 bonus distributions.

ELECTRO VECTOR, INC.
(Employer)

Dated ---------- By ----------
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 450 Golden Gate Ave., Federal Building, Rm. 13018, Box 36047, San Francisco, California, 94102—Telephone No. (415) 556-6721.

APPENDIX D

United States of America before the National Labor Relations Board

Case No. 20–CA–9771

ELECTRO VECTOR, INC., AND GENERAL TRUCK DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL 980, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Employer's Exceptions to the Administrative Law Judge's Decision

Pursuant to the Board's Rules and Regulations, Series 8, as amended, Section 102.46. Counsel for the Employer, ELECTRO VECTOR, INC., hereby files the following exceptions to the Administrative Law Judge's Decision in the above case, which Decision was issued on April 8, 1975, by Administrative Law Judge Richard J. Boyce.

Exceptions

1. Page 3, lines 19–24: To the statement of the Administrative Law Judge that the Employer's exclusion of strikers from participation in the bonus distribution, because not on the active payroll at the prescribed times, violated Section 8(a)(3) and (1).

2. Page 5, lines 10–13: To the Administrative Law Judge's conclusion of law that by disqualifying strikers from bonuses as found in this case, the Respondent ELECTRO VECTOR, INC., engaged in unfair labor practices within Section 8(a)(1) and (3) of the Act.

Respectfully submitted
Dated: April 25, 1975.

MERRILL & THOMPSON,
Attorneys for Respondent,
Electro Vector, Inc.
By: MICHAEL P. MERRILL.

U.S. GOVERNMENT PRINTING OFFICE: 1977

Supreme Court, U. S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1976

No. 76-1561

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

ELECTRO VECTOR, INC.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Subject Index

	Page
Questions presented	1
Statement of the case	2
Argument	5
A. Section 10(e) of the National Labor Relations Act requires the Board's findings to be sustained on appeal only if supported by substantial evidence in the record considered as a whole, exclusive of whether or not that lack of evidence was objected to by the responding party before the Board, its member agent or agency	5
B. The Ninth Circuit Court of Appeals properly concluded that the cash bonus for work previously performed herein was not a term or condition of employment within the meaning of Section 8(a)(3) of the Act	9
C. Even if the bonus is concluded to be a condition of employment wtihin the meaning of Section 8(a)(3) of the Act, there is no substantial evidence that the respondent violated the Act by failing to pay discretionary bonuses to permanently replaced strikers	10
Conclusion	19

Table of Authorities Cited

Cases	Page
Allied Industrial Workers, AFL-CIO, Local Union No. 289 v. NLRB, 476 F.2d 868 (1973)	12
Cavalier Division of Seeburg Corporation, 192 NLRB 290 (1971)	12
Century Electric Motor Company v. NLRB, 447 F.2d 10 (8th Cir. 1971)	10

Pages

E. I. DuPont DeNemours & Company v. NLRB, 480 F.2d 1245 (5th Cir. 1973) 8, 9

NLRB v. Cheney California Lumber Company, 327 U.S. 385 (1946) 6

NLRB v. Duncan Foundry and Machine Works, Inc., 435 F.2d 612 (C.A. 7, 1970) 12, 17, 19

NLRB v. Electric Steam Radiator Corporation, 321 F.2d 733 (6th Cir. 1963) 10

NLRB v. Federal-Mogul-Bower Bearings, Inc., National Seal Division, 336 F.2d 781 (C.A. 9, 1964) 16, 17

NLRB v. Frick Co., 397 F.2d 956 (C.A. 3, 1968) 12, 19

NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, (1967) 8, 9, 10, 11, 12, 17, 18, 19

NLRB v. Harrah's Club, 403 F.2d 865 (9th Cir. 1968) ... 10

NLRB v. Jemco, 465 F.2d 1148 (C.A. 6, 1972), cert. denied 409 U.S. 1109 12

NLRB v. Ochoa Fertilizer Corporation, 368 U.S. 318 (1961) 6, 7

NLRB v. Pistoresi, Nello & Son, Inc., 500 F.2d 399 (C.A. 9, 1974) 8, 10

NLRB v. Quality Castings Company, 325 F.2d 36 (C.A. 6, 1963) 13, 14, 17

NLRB v. Red Spot Electric Company, 191 F.2d 697 (C.A. 9, 1951) 6

NLRB v. Selvin, 527 F.2d 1273 (C.A. 9, 1975) 5

Pittsburgh-Des Moines Steel Company v. NLRB, 284 F.2d 74 (C.A. 9, 1960) 14, 17

Quality Castings Company, 139 NLRB 928 .....12, 13, 17

Radio Officers' Union v. NLRB, 347 U.S. 17 14

Tex-Tan Welhausen Co. Inc. v. NLRB, 419 F.2d 1265 (C.A. 5, 1969) 12, 19

Statutes

National Labor Relations Act:
Section 8(a)(1) 2, 7, 13
Section 8(a)(3) 2, 7, 9, 13
Section 10(e) 1, 5, 19

In the Supreme Court
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NATIONAL LABOR RELATIONS BOARD,
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ELECTRO VECTOR, INC.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Michael P. Merrill, on behalf of the Respondent, Electro Vector, Inc., hereby submits its Brief in opposition to the Solicitor General's request for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

The statement of the Opinions Below, Jurisdiction of this Court and the Statute Involved as set forth in the Petition for Writ of Certiorari submitted herein are correct.

QUESTIONS PRESENTED

1. Whether or not Section 10(e) of the National Labor Relations Act requires the Board's findings to

be sustained on appeal if the lack of certain evidence was not timely objected to by the responding party before the Board, its member agent or agency.

2. Whether the Ninth Circuit Court of Appeals erred in concluding that the bonus was not a term or condition of employment within the meaning of Section 8(a)(3) of the Act as a prerequisite of finding the Respondent in violation of that Section.

3. Whether, irrespective of said bonus being a condition of employment, there is substantial evidence that the Respondent violated Section 8(a)(3) and (1) by failing to pay the stated bonus to permanently replaced strikers.

STATEMENT OF THE CASE

The underlying facts of this case as indicated by the exhibits on file herein and the transcript are primarily undisputed. On May 2, 1974, the Union initiated an economic strike in support of collective bargaining demand. Initially, all of the production and maintenance employees of the Employer participated in said strike. (Tr. 10, 11).[1] On May 6, 1974, the Employer sent a letter to all striking employees requesting that they return to work by May 13, 1974, or that suitable replacements would be sought for their positions. (GC Ex. 7, Tr. 31, 32). As replacements were hired for appropriate positions, the striking employees were sent a second letter informing them of the replacement and their status as a replaced employee. (GC Ex. 88, Tr. 32, 33). On November 27, 1974, the Employer paid a bonus. (Tr. 24). This bonus was paid to all employees who (1) were actively working for the Company on that day, and (2) who were actively working for the Company at the end of the Company's fiscal year. (Tr. 17, 23, 29, 30, 37). The term "actively working" meant present at the Employer's place of business and actually working at that time. Notably, these criteria were uniformly applied to employees whether they were returning employees who had participated in the strike or not. Those employees who were working at the end of the fiscal year but who were not working on the date the bonus was paid as well as those employees who were on strike at the close of the fiscal year but returned prior to the payment date were not paid a bonus. (Tr. 19, 24).

This bonus was in no way an accrued benefit automatically paid to the employee. (Tr. 22). Further, it was not a set Company program to pay bonuses and, in fact, payment was in no way mandatory. (Tr. 18, 29, 30). The bonus was not a part of the expired collective bargaining agreement between the Employer and Union nor was there any written policy in existence as to that bonus with a computation thereof. (Tr. 22, 28, 30). To the contrary, the payment of the bonus was not necessarily tied to profits; rather, it was fully a matter of discretion with the Company and a decision which rested primarily with

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[1]References are to the transcript of the hearing before the Administrative Law Judge on March 4, 1975.

the owners after an annual audit of the Company's books. (Tr. 35, 37).

The bonus was computed at a base amount of $150.00. More was paid to supervisors, lead men, and others who showed exceptional merit. A percentage less than $150.00 was paid to others based on their over-all attendance for the past fiscal year. (Tr. 19, 28). The bonus was paid as part of a regular payroll check. (Tr. 41). Precisely the same format for computation and payment was followed as that utilized in fiscal year 1973 which was the first year any monetary bonuses were paid. Prior to that time, turkeys and other gifts in kind were given as bonuses for the precise same purposes. (Tr. 29, 41). The stated basis of paying this monetary bonus was primarily a "humanistic" one due to the economic hardships which the employees were suffering under in fiscal year 1973 in addition to the Company's desire to keep attendance at an optimum. (Tr. 36).

At the time the bonus was paid, over one-third of the striking employees had already abandoned the strike and returned to work for the Employer. (Tr. 40). The record shows no promise of payments to returning strikers or replacement of strikers still supporting the work stoppage. (Tr. 24, 25, 31). At the time of the computation and granting of the bonus, there was no expectation that the employees then on strike would return to work for the Employer. (Tr. 39, 40). The testimony of employees still on strike indicated that there were no negative effects caused by the granting of this bonus. (Tr. 7 through 15).

ARGUMENT

A. SECTION 10(e) OF THE NATIONAL LABOR RELATIONS ACT REQUIRES THE BOARD'S FINDINGS TO BE SUSTAINED ON APPEAL ONLY IF SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD CONSIDERED AS A WHOLE, EXCLUSIVE OF WHETHER OR NOT THAT LACK OF EVIDENCE WAS OBJECTED TO BY THE RESPONDING PARTY BEFORE THE BOARD, ITS MEMBER AGENT OR AGENCY.

As indicated by the Board in its petition, Section 10(e) of the Act provides as follows:

> "No objection that has not been urged before the Board, its member agent or agency shall be considered by the Court, unless the failure or neglect to urge such objection will be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive . . ."

The Ninth Circuit Court of Appeals in *NLRB v. Selvin*, 527 F.2d 1273 (C.A. 9, 1975) has indicated that the limitation that objections to the Board's application for enforcement must be urged before the Board previous to being considered by the Court is independent from the question of whether or not the Board patently travelled outside the orbit of its authority. It is Respondent's contention that *Selvin* stands for the proposition that the Board's factual findings will be sustained on appeal only if supported by substantial evidence in the record considered as a whole; regardless of whether or not previous objection has been made to lack of substantial evidence in a particular area before the Board or any of its agencies.

The foregoing analysis would appear to be consistent with the language in *NLRB v. Red Spot Electric Company,* 191 F.2d 697 (C.A. 9, 1951). In that case, the Board had moved for summary entry of decree of enforcement of a Board order automatically, without examination, inasmuch as the Respondent had not filed exceptions to the Board's previous decision and had not made an appearance before the Court. Although the Ninth Circuit Court of Appeals did eventually enforce the Board's order, it rejected automatic enforcement, stating *inter alia* that it is the custom of the courts to take notice of manifest error to which no exception has been made, quoting from *NLRB v. Cheney California Lumber Company,* 327 U.S. 385 (1946):

> "Since the Court is ordering entry of a decree, it need not render such a decree if the Board has patently travelled outside the orbit of its authority so that legally speaking there is no order to enforce." (*NLRB v. Cheney,* 327 U.S. 385, 387.)

The leading Supreme Court cases in this area are *NLRB v. Cheney California Lumber Company,* 327 U.S. 385 (1946) and *NLRB v. Ochoa Fertilizer Corporation,* 368 U.S. 318 (1961). It is significant to note that in both of those cases, the respondent employers had not taken exception to the hearing officer's decision, nor had they made an appearance in the Circuit Court of Appeals in which the Board was seeking enforcement of the order.

In *Cheney,* this Court noted that there had been no previous objection made to interstate commerce

requirements or actual violation of the National Labor Relations Act. Both of these areas do not relate to questions of substantial evidence, but are rather basic requirements for jurisdiction by the Board. In *Ochoa,* the Court *sua sponte* deleted certain terms of a cease and desist order which had actually been consented to by the parties. This Court in that case emphasized the importance of a consent by both parties in reversing the First Circuit Court of Appeals:

> "Contrary to the Court of Appeals, we think that consent makes a significant difference; it relieves the Board of the very necessity of making a supporting record. A decree rendered by consent 'is always affirmed without considering the merits of the cause'. *Nashville C of ST L.R. Company v. U.S.,* 113 U.S. 261."

Furthermore, this case again concerned critical statutory or jurisdictional language as opposed to consideration of substantial evidence.

Conversely, in the instant case, we are concerned only with the issue of substantial evidence. Additionally, the Respondent Company, Electro Vector, Inc., did file exceptions to the administrative law judge's conclusion of law that it had engaged in unfair labor practices within Section 8(a)(1) and (3) of the National Labor Relations Act by disqualifying strikers from bonuses, thereby discriminating against employees with regard to their hours and conditions of employment. Respondent in this case has also made an appearance before the Ninth Circuit Court of Appeals supporting its position both factually and

legally. As to the factual issue of whether or not the bonus was in fact a term or condition of employment, the Respondent has steadfastly maintained that this bonus was clearly a matter of discretion with the Company.

Effectively, the Respondent's filing of exceptions in this matter and their appearance in this case has placed the burden upon the Board to support its order as to questions of fact by substantial evidence on the record, which requires a showing that the employer has discriminated against employees with respect to a term or condition of employment. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 30 (1967); *E. I. DuPont DeNemours & Company v. NLRB*, 480 F.2d 1245, 1248 (5th Cir. 1973). Inclusion in the record of uncontroverted evidence that the bonus paid was purely a discretionary one in this case raises the issue *de facto*. Its importance is buttressed by its mention in the employer's brief supporting its objections to the National Labor Relations Board and in its brief before the Ninth Circuit Court of Appeals. Failure of counsel to mention the precedent case of *NLRB v. Pistoresi, Nello & Son, Inc.*, 500 F.2d 399 (C.A. 9, 1974) did not require the Ninth Circuit Court of Appeals to ignore the existence of that case.

B. THE NINTH CIRCUIT COURT OF APPEALS PROPERLY CONCLUDED THAT THE CASH BONUS FOR WORK PREVIOUSLY PERFORMED HEREIN WAS NOT A TERM OR CONDITION OF EMPLOYMENT WITHIN THE MEANING OF SECTION 8(a)(3) OF THE ACT.

The Court of Appeals properly interpreted the record below in determining that the bonus in question did not in fact amount to a condition of employment. Reviewing the evidence in the record, the Court indicated that prior to 1973 the Company did not have a bonus program. In 1973 the Company did in fact pay a bonus but it did not establish an official program of bonuses. The accountant for Electro Vector, Inc., indicated that this bonus was never automatically given. The Vice President and General Manager of Electro Vector, Inc., further testified that the giving of a bonus was not mandatory but was at the discretion of the owner of the Company. It is important to note further that this bonus was not part of the Union contract which was in existence at the time of the controversy. The above evidence was unrefuted by any witnesses or documentary evidence to the contrary.

The Court of Appeals properly determined that in order to find employer discrimination with respect to a term or condition of employment, the benefit being conferred by the employer must in fact be "a term or condition of employment." *NLRB v. Great Dane Trailers, Inc., supra; E. I. DuPont DeNemours & Company v. NLRB, supra.* A bonus may in fact be a wage in some circumstances and in other circumstances be considered to be a gift. Bonuses should

properly be considered gifts unless they have been paid over a sufficient length of time to have become a reasonable expectation of the employees and, therefore, to be a part of their anticipated remuneration. *Century Electric Motor Company v. NLRB,* 447 F.2d 10 (8th Cir. 1971); *NLRB v. Harrah's Club,* 403 F.2d 865 (9th Cir. 1968); *NLRB v. Electric Steam Radiator Corporation,* 321 F.2d 733 (6th Cir. 1963); *NLRB v. Pistoresi, Nello & Son, Inc.,* 500 F.2d 399 (9th Cir. 1974).

C. EVEN IF THE BONUS IS CONCLUDED TO BE A CONDITION OF EMPLOYMENT WITHIN THE MEANING OF SECTION 8(a)(3) OF THE ACT, THERE IS NO SUBSTANTIAL EVIDENCE THAT THE RESPONDENT VIOLATED THE ACT BY FAILING TO PAY DISCRETIONARY BONUSES TO PERMANENTLY REPLACED STRIKERS.

The leading case in this area is the *NLRB v. Great Dane Trailers, Inc., supra,* wherein this Court held that the Court of Appeals below erred in speculating as to the motives of the Employer/Company. In that case, accrued vacation benefits under an expired Union contract were summarily denied to strikers. The record was entirely devoid of the Company's motivation in denying such benefits to the strikers and this Court held that the Court of Appeals could not speculate as to what the Employer's motives were in such a denial, specifying the applicable rule of law as follows:

> "From this review of our recent decisions, several principles of controlling importance here can be distilled. First, if it can be reasonably concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights, no proof of an anti-union motivation is needed and the Board can find an unfair labor practice even if the Employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight' an anti-union motivation must be proved to sustain the charge if the Employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the Employer engaged in discriminatory conduct which could have adversely affected the employee rights to some extent, the burden is upon the Employer to establish that he was motivated by legitimate objective since proof of motivation is most accessible to him."

Essentially, the *Great Dane Trailers, Inc.* case is one that sets forth the various burdens of proof. On one hand, if it is reasonably concluded that an Employer's discriminatory conduct is inherently destructive of important employee rights, then the Board need not prove any further anti-union motivation. On the other hand, if the Board shows discriminatory conduct which is comparatively slight, then anti-union motivation must be proved to sustain the charge. In this second instance, the Employer must first place on the record proof of a legitimate and substantial justification for his conduct. Once the Employer's motivations other than anti-union are placed on the record, it then becomes the Board's burden to rebut

these business justifications and prove a case of anti-union motivation. It is important to note that in the case of alleged discriminatory action which results in a comparatively slight effect on employee rights that the National Labor Relations Board must prove the anti-union motivation in order to legitimately find a violation of the act.

Apart from the controlling precedent with regard to burdens of proof and legal presumptions, the *Great Dane Trailers, Inc.*, case, *supra*, has been cited as factual precedent in subsequent accrued benefits cases. *NLRB v. Frick Co.*, 397 F.2d 956 (C.A. 3, 1968); *NLRB v. Duncan Foundry and Machine Works, Inc.*, 435 F.2d 612 (C.A. 7, 1970); *Tex-Tan Welhausen Co. Inc. v. NLRB*, 419 F.2d 1265 (C.A. 5, 1969). As in *Great Dane Trailers, Inc., supra*, each of the foregoing cases involved the denial of accrued vacation benefits as set forth in prior existing union contracts which had expired prior to the commencement of strike activity. Notably, the additional cases cited by general counsel in support of the Board's contentions herein also involved accrued vacation benefits. *Cavalier Division of Seeburg Corporation*, 192 NLRB 290 (1971); *Allied Industrial Workers, AFL-CIO, Local Union No. 289 v. NLRB*, 476 F.2d 868 (1973); *NLRB v. Jemco*, 465 F.2d 1148 (C.A. 6, 1972), *cert. denied*, 409 U.S. 1109.

The controlling Board precedent which was applied in this case both by the administrative law judge and the Board itself was the National Labor Relations Board case of *Quality Castings Company*, 139 NLRB 928. That case involved the distribution under a

profit sharing plan. Each employee to qualify had to have worked fifty percent of the time between January and September preceding distribution. The amounts paid to those qualifying were a function of absenteeism, exceptions being allowed for excused absences. Some 64 employees struck in April and May of that year and were not thereafter recalled for valid economic reasons. Because of this, these striking employees were deemed not to have satisfied the qualifying criteria and were denied any distributions under the profit sharing plan. The National Labor Relations Board found that the disqualified strikers had been discriminated against in violation of Section 8(a)(3) and (1) on the basis that time on strike may not be lawfully considered the equivalent of normal absence for the purposes of determining a forfeiture. The Board specifically stated:

> "The Respondent cannot be required to make distributions to individuals for the period they were absent on strike. Neither, however, can the Respondent state that strike time is merely another form of absence equating it to other forms of absence discouraged by it and then proceed to impose a total nonproportionate forfeiture on employees because they engaged in such absences—in effect because they are engaged in Section 7 Activities."

The reasoning of the *Quality Castings Company* case which is the leading Board precedent has not been accepted by the Circuit Courts of Appeals in total. In fact, the *Quality Castings Company* case was reversed by the Court of Appeals for the Sixth Circuit. *NLRB v. Quality Castings Company*, 325

F.2d 36 (C.A. 6, 1963). In that opinion, the Court of Appeals quoted in length from this Court's opinion in *Radio Officers' Union v. NLRB,* 347 U.S. 17, stating as follows:

> "The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus, this section does not outlaw all encouragement or discouragement of membership in labor organizations. Only such as is accomplished by dscrimination is prohibited. Nor does this section outlaw discrimination in employment as such. Only such discrimination as encourages or discourages membership in a labor organization is proscribed."

This Court in that case went on to state:

> "We are of the opinion that when as in this case an Employer's action is not specifically directed against those who have engaged in protected types of union activity but is rather *directed at a group which is defined by other than union membership or activity criteria and which clearly includes others who did not engage in the protected concerted activities. The Board not only must prove discrimination but also it must prove the Employer's motivation.* There is nothing in *NLRB v. Erie Registor Corporation,* 373 U.S. 221 (1963), which conflicts with this holding." (Emphasis added).

The specific precedent set forth in the Ninth Circuit Court of Appeals has been similar to that of the Sixth Circuit in its refusal to enforce Board orders in such cases. In the case of *Pittsburgh-Des Moines Steel Company v. NLRB,* 284 F.2d 74 (C.A. 9, 1960), the Employer's petition to set aside the order of the

Board was granted. In that case, the Employer had denied a bonus to said workers of a plant because of their failure to achieve sufficient productivity to satisfy the demands of the Company's bonus formula. The lack of productivity was clearly the consequence of a strike carried on by the employees. The rationale in that case was as follows:

> "That protected union activity is the direct cause of a business condition upon which an Employer actually predicates discrimination among his employees does not mean that the basis for discrimination is the protected union activity. An employer may hire permanent replacements for economic strikers even though the business condition—and a lack of manpower—which impels the Employer to act was directly caused by a strike . . . indicates that when in order to obtain replacements for economic strikers it is necessary for an employer to promise seniority to the replacements, the denial of seniority status to those strikers who are reinstated, is not an unfair labor practice although the business condition which actuated the Employer to deny seniority status to reinstated strikers was directly caused by the strike itself and in Local 200 *International Brotherhood of Teamsters v. NLRB,* 233 F.2d 233, 238 (7th Circuit 1956) the court approved a conclusion of the Board which held that Employer had not committed an unfair labor practice by discharging an employee because the demand for his job had ceased even though the job was rendered unnecessary by the employee's own picketing. The picketing, a protected union activity, had caused business to drop off with the result that the Employer no longer had any need for the job which the employee had been doing."

The Ninth Circuit Court of Appeals further indicated that frequently the very business condition upon which the Employer has predicated the alleged discriminatory action is the direct result of participation in protected union activity and in this specific case the particular poor productivity of the group which did not receive the bonus was in fact caused by their participation in a prolonged strike during the year in question. Effectively, the strike had caused the business condition which the Employer then used as the criteria for its determination to withhold the bonus. The important point was that the protected Union activity was not in itself the basis of the Employer's discrimination. The Court then concluded that to enforce the Board's order they must find in the records substantial evidence of the bad motive or intent which underlay the Company's action other than the discriminatory act itself and its foreseeable consequences.

In *NLRB v. Federal-Mogul-Bower Bearings, Inc., National Seal Division,* 336 F.2d 781 (C.A. 9, 1964), the Employer terminated several employees who had not completed their sixty day probation period and who had incidentally participated in a strike. The case was heard upon stipulated facts indicating no anti-union animus by the Employer. In that case, it was indicated that the Board is bound to first consider the effect of the Employer's rule or conduct on the rights of the employee to strike and secondly, the Board must consider the claimed business purpose of the Employer in promulgating the rule or adopting the course of conduct in issue; and further, that

upon a balance in favor of one side or the other being struck, that evidence concerning the motivation of the Employer would become an important element. The Ninth Circuit Court of Appeals went on to hold in *NLRB v. Federal-Mogul-Bower Bearings, Inc., supra,* that the record considered as a whole was barren of substantial evidence to sustain the Board's finding of unfair labor practices by the Respondent Company.

The foregoing cases, to wit: *NLRB v. Quality Castings Company; NLRB v. Federal-Mogul-Bower Bearings, Inc.,* and *Pittsburgh-Des Moines Steel Company v. NLRB, supra,* admittedly predate the Supreme Court's decision in *NLRB v. Great Dane Trailers, Inc., supra.* Notwithstanding this fact, the *Great Dane Trailers, Inc.,* case does not specifically overrule the precedent set in these foregoing cases but merely states a new approach with regard to setting forth certain presumptions and burdens of proof to be borne by the National Labor Relations Board and the respective Employer. In the specific matter of facts which give rise to an unfair labor practice in the alleged discriminatory denial of employee benefits, the Federal Courts have never expanded the Board's *Quality Castings* doctrine beyond that of the denial of accrued vacation benefits which had previously been provided for by an expired union contract.

In the case of *NLRB v. Duncan Foundry and Machine Works, Inc., supra,* the Ninth Circuit Court of Appeals specifically distinguished the *Pittsburgh-Des Moines Steel* case, *supra,* as not controlling in that particular situation because it dealt with a pro-

duction bonus as opposed to a question of accrued vacation benefits under an expired union contract.

Applying the foregoing legal principles to the instant case, it is the Employer's contention that the payment of discretionary bonus in the manner set forth by established company policy did not constitute a violation of the National Labor Relations Act. In the language of the *Great Dane Trailers, Inc.,* case, the action of the Employer in this case is clearly not that which can be described as inherently destructive of employee rights. This bonus was (1) a purely discretionary act on the part of the Employer; (2) totally unannounced to any employees including strikers or non-strikers; (3) took place after the majority of strikers had either been permanently replaced or had abandoned the strike and returned to work; (4) not viewed as having a substantial impact on the employees which were still on strike according to both their testimony and that of the Employer's representatives. This fact is buttressed by the finding of the administrative law judge and the Board that the particular act charged herein did not constitute a serious enough violation to convert the economic strike which was in progress to an unfair labor practice strike.

The instant situation is one where the Employer is presumed to have granted the bonus as a discriminatory act absent any evidence on the record to the contrary. However, the record is not void of the Employer's motivation. Representatives of the Employer have specifically testified that the motivation behind granting such a bonus was based on humanitarian desires as well as encouraging good attendance.

Once this evidence of a substantial business interest has been placed on the record, it is then the duty of the Board to show controverting evidence of anti-union animus. In this case, there is virtually no evidence of anti-union animus other than the alleged discriminatory action of granting the bonus itself.

Further, unlike the cases of *Great Dane Trailers, Inc.; Frick Company; Duncan Foundry and Machine Works* and *Tex-Tan Welhausen,* there was no entitlement to benefits set forth in any pre-existing contract nor was there any entitlement to a bonus at all for the year 1974 unless the Employer deemed it appropriate.

CONCLUSION

To summarize, the Ninth Circuit Court of Appeals was correct in holding, in line with its precedent, that the bonus paid was not a condition of employment; and even if this Court found to the contrary, the facts still fail to produce the substantial evidence required for enforcement of a Board order. In any case, Section 10(e) does not vitiate the traditional requirement that the Board's findings may only be supported by substantial evidence.

Accordingly, the Petition for Writ of Certiorari should be denied.

Dated, June 1, 1977.

Respectfully submitted,
GEORGE J. TICHY, II,
MICHAEL P. MERRILL,
Attorneys for Respondent.